

O/A 5-8-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,330

TIMOTHY MICHAEL JOYCE,  
Petitioner,

vs.

STATE OF FLORIDA,  
Respondent.

*[Handwritten signature]*  
CLERK OF THE SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

ON PETITION TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW  
DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

REPLY BRIEF OF THE PETITIONER

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## SUMMARY OF THE ARGUMENT

The State's argument that the defendant did not preserve the discovery violation issue is patently without merit. Defense counsel's Motion for Mistrial immediately prior to the testimony of the State's chief prosecution witness, Detective Scott Israel, clearly apprised the trial court that the basis for the discovery objection was that Israel was going to testify to highly incriminating statements attributed to the defendant which were not previously provided to the defense in discovery. Moreover, during Israel's incriminating testimony, co-counsel for the defendant expressly objected that Israel was testifying to statements not previously provided to the defense. In these circumstances, the discovery violation was clearly and sufficiently preserved for appeal. The failure of the trial court to conduct a Richardson inquiry constitutes per se reversible error.

Regarding the trial court's erroneous exclusion of defense Exhibits B & C, purportedly identical copies of the original tape recording, the State has ignored the entire basis for introduction of these exhibits, namely their impeachment value. The State's speculation explaining the vast differences between the purportedly original tape recording played at the pre-trial Motion to Suppress and the tape played during trial in no manner can justify the

trial court's exclusion of the defense impeachment exhibits. The State has totally failed to address the controlling precedent cited in defendant's Initial Brief on this issue. Far from constituting mere cumulative evidence, the defense exhibits sought to be introduced were crucial to impeach the only evidence against the defendant, namely, the tape recording and Detective Israel's testimony.

Finally, the vague conspiracy count in the case at bar is indistinguishable from the doomed conspiracy charge condemned by this Court in Goldberg v. State, infra. The State's inexplicable refusal to acknowledge that the Information in the case at bar constains the identical improper conjunctive language as appeared in Goldberg and its progeny best illustrates the State's total failure to overcome the defense's claim on this issue.

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A RICHARDSON INQUIRY INTO THE STATE'S DISCOVERY VIOLATION OF FAILING TO PROVIDE INCRIMINATING STATEMENTS PURPORTEDLY MADE BY THE DEFENDANT DESPITE DEFENDANT'S TIMELY DISCOVERY DEMANDS FOR SAID STATEMENTS AND WHERE THE DEFENDANT WAS MISLED INTO BELIEVING THAT A TAPE RECORDING PROVIDED TO HIM CONTAINED ALL STATEMENTS, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The State seeks to avoid its blatant discovery violation in failing to provide the defense with highly

incriminating statements purportedly made by the defendant by the simple expedient of ignoring the violation. Instead, the State chooses to argue there was no discovery violation since the State provided the defense with the entire tape recording it had in its possession. See Answer Brief (hereinafter A.B.) at page 7. The State actually asserts that the defendant's complaint in the Fourth District and in the trial court was that the State "failed to inform the defense that the tape recording of the transaction was incomplete, that is[,] that the recording ceased before the transaction was complete." (A.B. at 7). Apparently, the State asserts that the defendant is now raising for the first time in this case the argument that the discovery violation was "that the state never informed the defense that the defendant made incriminating statements to Officer Israel, which statements were not recorded on the tape and to which Detective Israel was going to (and was allowed to) testify to at trial." (A.B. at 8) The record, however, clearly belies the State's effort to avoid this issue.

As is more fully set forth in the defendant's Initial Brief at pages 15-18, immediately prior to the testimony of the chief prosecution witness, Detective Scott Israel, when the defense learned for the first time that the tape recording did not contain all of the conversation in the motel room as the prosecution had led the defense to believe, defense



counsel moved for a mistrial (R. 1325-31), and expressly predicated his argument on the ground that Detective Israel was about to testify to incriminating statements never before provided to the defense. The trial court responded that Detective Israel was "going to be here in a minute. We'll find out." (R 1329). Part and parcel to that argument was the assertion that the State failed to advise the defense that the tape recording of the transaction in the motel room was incomplete; however, it was clear to all participants in the courtroom that the mistrial motion was based upon the fact that Detective Israel was going to testify to incriminating statements not recorded on the tape and never before provided to the defense. See R. 1329. Moreover, the State's unfounded argument that "never does defendant assert that Detective Israel is testifying to incriminating statements made by him, which had not previously been disclosed to him..." (State's emphasis, A.B. at 8), is totally belied by the defense objection made during Detective Israel's direct examination as follows:

Detective Israel stated on his direct testimony that the tape stopped when he first went down to make the telephone call at the pay phone. So, he knew at that point there was more things to be recorded after the tape had stopped. And no one notified defense counsel...(R. 1447-8)

The trial court, as it had previously done with regard to the mistrial motion (R. 1331), overruled this objection (R. 1448).

Thus, the State's repeated argument at page 10 of its brief that Detective Israel's testimony concerning the incriminating statements made by the Defendant "were not objected to", is clearly refuted by the record. Moreover, the State's "not objected to" argument ignores the settled principles concerning preservation of error that no objection or "magic words" are required so long as the trial court is placed on notice as to the substance of the claimed error. The defendant's vociferous mistrial motion (R. 1326-31) more than put the trial judge on notice about the discovery violation issue.

In Thomas v. State, 419 So.2d 634, 636 (Fla. 1982), Spurlock v. State, 420 So.2d 875, 876-7 (Fla. 1982), State v. Heathcoat, 442 So.2d 955, 956 (Fla. 1983), and Jackson v. State, 451 So.2d 458, 461 (Fla. 1984), this Court expressly held that the objectives of the contemporaneous objection rule are to "apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." Thomas, supra, at 636. These objectives "are accomplished when the record shows clearly and unambiguously that a request was made...and that the trial court clearly understood the request and just as clearly denied the request." Heathcoat, supra at 956.

Moreover, in the precise context of a discovery violation such as occurred in the case at bar, the courts have held that

a mistrial motion, as opposed to an "objection" based on a discovery violation is sufficient to preserve the issue for appeal. Thus, Raffone v. State, 11 FLW 342 (Fla. 4th DCA Feb. 5, 1986), rejected the State's claim that the defendants failed to preserve the discovery issue for appeal where they "moved for a mistrial instead of objecting because of a discovery violation. This argument is without merit. While the defendants did not recite particular magic words, the manner in which they brought the matter to the trial court's attention was more than sufficient to apprise the court of the nature of their complaint." 11 FLW at 343. See also, Torres v. State, 474 So.2d 335 (Fla. 3d DCA 1985) (motion for mistrial based on discovery violation sufficiently preserved issue for appeal).

The State, at page 9 of its brief, argues that the defendants were aware that "Detective Kridos was going to testify to incriminating statements made by them...". (Emphasis added) The defendant must point out that Detective Kridos testified only to incriminating statements made by co-defendants at another location miles away from the motel room where Detective Israel was conducting the purported transaction with the defendant. See R. 877-81, 904. Thus, whether or not the Defendant was aware that Detective Kridos was going to testify to incriminating statements made by co-defendants is totally irrelevant to the discovery violation concerning

incriminating statements attributed to the defendant at another location by Detective Israel.

Content to rely upon its lack of preservation claim, the State ignores the merits of the discovery violation and the trial court's admitted failure to conduct any Richardson inquiry. See defendant's Initial Brief at 18-22. Subsequent to the filing of that brief, numerous decisions reversing for nearly identical Richardson violations have occurred. In addition to Raffone and Torres, cited above, see Hall v. State, 477 So.2d 572 (Fla. 4th DCA 1985); Hickey v. State, 11 FLW 431 (Fla. 5th DCA Feb. 13, 1986) (refusing to recognize an exception to Richardson where the State fails to disclose statements not intended to be used at trial); Waters v. State, 11 FLW 580 (Fla. 5th DCA Mar. 6, 1986) (no exception where prosecutor used defendant's previously undisclosed statements to attack his credibility in closing argument).

The State has utterly failed to refute the discovery violation, and the defendant is entitled to a new trial.

#### POINT II

THE TRIAL COURT ERRED IN REFUSING TO ADMIT THE TWO TAPE RECORDINGS IDENTIFIED AS DEFENDANT'S EXHIBITS B AND C INTO EVIDENCE TO BE PLAYED TO THE JURY TO IMPEACH THE "ORIGINAL" TAPE RECORDING ADMITTED AS STATE'S EXHIBIT 15 AND TO IMPEACH THE TESTIMONY OF DETECTIVE ISRAEL AND SERGEANT SMITH, THUS DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

Initially, the State argues that this Court should exercise its discretion not to consider this issue on

appeal since the Fourth District already rejected it. In support, the State cites State v. Hegstrom, 407 So.2d 1343, 1344 (Fla. 1981), where this Court declined to re-weigh the evidence after it had previously been reviewed once by the district court of appeal. In the case at bar, the defendant is not asking this Court to reweigh evidence, but rather to exercise its discretionary jurisdiction regarding a matter that goes to the validity of the fact-finding process in the trial court. Clearly, this Court has jurisdiction "over all issues" obtained once a conflict of decisions has been established. Jacobson v. State, 476 So.2d 1282, 1285 (Fla. 1985). The State's reference at page 11 of its brief to a "flawed jury instruction" is obviously taken from some unrelated brief in another matter.

In an effort to explain the substantial differences between the purportedly identical tape recording played at the pre-trial suppression hearing and again during the trial in chief, the State engages in rank speculation that the Court Reporter at the trial was "apparently able to comprehend more of the conversation recorded on the tape than the Court Reporter at the pre-trial hearing." (A.B. at 12; emphasis added). Moreover, the State ignores that portion of the testimony of the defense expert, Dr. Harry Hollien, that there were "several rather substantial differences" between the original and the copies of the

tape recording. (R. 1917). Dr. Hollien testified that there was a substantial likelihood that the original tape recording had been tampered with. (R. 1804-1805). With this predicate in mind, it is clear that the Defendant was entitled to have the purportedly identical copies of the tape (R 81-2, 93-4, 1650), which copies Detective Israel himself utilized repeatedly to refresh his fading memory and to prepare for trial (R 1422-3, 1437-8, 1588-9, 1591-3, 1700, 1742-3), played before the jury to impeach Israel's trial testimony as well as the "original" tape recording. (R 1936-7, 1940-1). The State's argument that the copies would be "cumulative" to the original tape introduced into evidence by the State ignores the impeachment value of the copies and, as is evident throughout the State's brief, the State fails to deal with the gravamen of this point on appeal. The State does not address the controlling decision of Onontario of Florida, Inc. v. R.P. Trucking Co., 399 So.2d 1117 (Fla. 4th DCA 1981), where two compilations of an original log were held admissible to impeach the credibility of the original. (See Defendant's Initial Brief at p. 31)

The State argues that the prosecution at trial objected that the copies were not relevant to any issue. (R. 1831). (See A.B. at 13). It is significant that the State, neither at trial, in the Fourth District nor in this Court, argued that the defense exhibits sought to be introduced would in any manner prejudice the State. The State steadfastly ignores

the impeachment purposes that would be served by introduction of the defense copies. Moreover, the State ignores the fact that the prosecutor, in his closing argument, exacerbated the trial court's error in excluding the tapes when the prosecutor argued to the jury that the defense copies were "an obvious attempt to mislead you...". (R 2620). For the reasons set forth in Defendant's Initial Brief at 23-33, the Defendant is entitled to a new trial predicated on the trial court's erroneous exclusion of the defense exhibits.

### POINT III.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS THE CONSPIRACY COUNT WHERE THE INFORMATION WAS UNCONSTITUTIONALLY VAGUE AND INDEFINITE IN ALLEGING THAT THE DEFENDANT "INDIVIDUALLY OR SEVERALLY" CONSPIRED WITH VARIOUS CO-DEFENDANTS, MAKING IT IMPOSSIBLE TO DETERMINE WITH WHOM THE DEFENDANT WAS ALLEGED TO HAVE CONSPIRED, THUS DENYING DEFENDANT DUE PROCESS OF LAW.

At page 18 of its Brief, the State unabashedly asserts that the language of the conspiracy charge in the case at bar contains no "ors"<sup>1</sup>, and charges all eight defendants as a group with conspiring together to traffick in cannabis. Of course, the State looks only to the initial portion of Count II of the Information and ignores the

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The State repeatedly ignores the "or" language which appears throughout the conspiracy charge. (See State's Answer Brief at pages 16 and 18)

subsequent language of this Count charging that various configurations of Defendants "jointly or severally" committed specified acts. (Emphasis added). See R. 2864-2864A.

At page 17 of its brief, the State appears to concede that "granted a variety of acts are alleged, but each of those acts (possession, sale, delivery, etc.) constitutes the crime of trafficking...". The State ignores the fact that "[b]y including sale and possession of drugs within the trafficking statute, it is apparent that the legislature intended to facilitate trafficking prosecutions through the use of alternative methods of proof...". Bell v. State, 437 So.2d 1057, 1060 (Fla. 1983) (emphasis added). Inasmuch as trafficking can be accomplished by any variety of methods, and a conspiracy charge must set forth the manner and means of the object of the conspiracy with as much precision as the nature of the case will permit, Goldberg v. State, 351 So.2d 332 (Fla. 1977), the alternative pleading contained in the instant conspiracy charge, which the State inexplicably ignores, is fatally vague, and the State has not shown otherwise.

The State seeks comfort in the fact that "the participants are all named" in the instant Information. (See A.B. at 17) Of course, all of the participants were also named in the defective Goldberg indictment, as well as in the charging documents condemned in the Goldberg progeny.

At pages 18-19 of its Brief, the State misapplies State v. Casesa, 392 So.2d 1022 (Fla. 5th DCA 1981), where all of



the Defendants were alleged to have committed all of the acts; there was no alternative language ever employed in the Casesa conspiracy information. Incredibly, the State, at page 18 of its Brief, appears to quote from the instant Information as alleging that the Defendants "jointly and severally" performed specific acts. (Emphasis added) Unfortunately, the instant Information employs the word "or" in four instances and never utilizes the conjunctive "and." There is simply no comparison between the Casesa conspiracy charge and the Information in the case at bar.

Finally, at page 19 of its Brief, the State misapplies State v. Segura, 378 So.2d 1240 (Fla. 2d DCA 1979), in which the Second District (not the Third District as mis-cited by the State) expressly held that the conspiracy charge there "does not contain alternative pleading." 378 So.2d at 1242 (emphasis added). As already observed, this certainly cannot be said with regard to the conspiracy charge in the case at bar.

The State's persistent refusal to acknowledge the true state of facts apparent on the face of the instant record best illustrates the worth to the defendant's contentions in this case. The trial court erred in denying the Defendant's Motion to Dismiss the vague conspiracy charge and the State has not shown otherwise.

POINT IV.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS ON THE GROUNDS OF ENTRAPMENT AS A MATTER OF LAW BASED ON OUTRAGEOUS GOVERNMENTAL MISCONDUCT ARISING FROM A "REVERSE STING" OPERATION WHEREBY THE POLICE MANUFACTURE CRIMINAL ACTIVITY WHICH WOULD NOT OTHERWISE HAVE OCCURRED AND UTILIZE MEANS WHICH CREATE A SUBSTANTIAL RISK THAT THE OFFENSE WOULD BE COMMITTED BY PERSONS OTHER THAN THOSE WHO WERE READY TO COMMIT IT, THUS DENYING DEFENDANT DUE PROCESS OF LAW.

POINT V.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR MISTRIAL PREDICATED UPON THE TRIAL COURT'S PREJUDICIAL COMMENTS IN THE PRESENCE OF THE JURY AND THE PROSECUTOR'S CLOSING ARGUMENTS TO THE JURY WHERE SAID JUDICIAL AND PROSECUTORIAL COMMENTS DEPRIVED THE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.

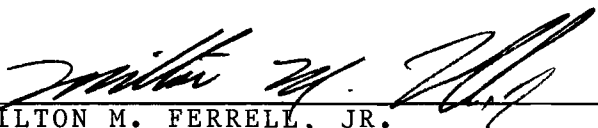
The defendant respectfully adopts the Reply Brief of Co-Petitioner Ronald Matheson filed this date, as his Reply to the State's Answer Brief on these two issues.

CONCLUSION

Based upon the above and foregoing argument and citation of authority, as well as the defendant's Initial Brief, the defendant respectfully requests this Court to reverse the judgment of conviction and sentence entered by the trial

court with directions that he be discharged, or alternatively,  
granted a new trial.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing  
Reply Brief of Petitioner was mailed this 31st day of  
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